

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FAWN W. o/b/o A.G.,

Plaintiff,

Case No. C22-5553-MLP

V.

ORDER

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

I. INTRODUCTION

Plaintiff seeks review of the denial of her minor daughter’s application for Supplemental Security Income.¹ Plaintiff contends the administrative law judge (“ALJ”) erred in assessing her testimony and Claimant’s testimony, and in assessing a treating counselor’s opinion. (Dkt. # 8 at 1.) As discussed below, the Court REVERSES the Commissioner’s final decision and REMANDS the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

II. BACKGROUND

Claimant was born in 2008 and had completed seventh grade at the time of the

¹ Plaintiff's daughter is hereinafter referred to as "Claimant."

1 administrative hearing. AR at 43. In March 2020, Plaintiff applied for benefits, alleging that
2 Claimant became disabled on February 28, 2020. *Id.* at 189-99. Plaintiff's application was denied
3 initially and on reconsideration, and Plaintiff requested a hearing. *Id.* at 104-10, 114-21. After
4 the ALJ conducted a hearing in July 2021, the ALJ issued a decision finding Claimant not
5 disabled. *Id.* at 15-28.

6 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the
7 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the
8 Commissioner to this Court. (Dkt. # 1.)

9 **III. LEGAL STANDARDS**

10 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social
11 security benefits when the ALJ's findings are based on legal error or not supported by substantial
12 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a
13 general principle, an ALJ's error may be deemed harmless where it is "inconsequential to the
14 ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
15 (cited sources omitted). The Court looks to "the record as a whole to determine whether the error
16 alters the outcome of the case." *Id.*

17 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such
18 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
20 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
21 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
22 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may
23 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*

1 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one
 2 rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

3 IV. DISCUSSION

4 A. The ALJ Erred in Discounting Plaintiff's and Claimant's Hearing Testimony

5 Plaintiff argues that the ALJ erred in discounting her hearing testimony and failing to
 6 separately acknowledge and assess Claimant's hearing testimony. (Dkt. # 8 at 4-11.) As to
 7 Plaintiff's second argument, the Court finds no reversible error in the ALJ's failure to separately
 8 summarize Claimant's testimony in addition to Plaintiff's testimony, particularly because they
 9 provided similar testimony. *See, e.g.*, Social Security Ruling 16-3p, 2017 WL 5180304, at *6
 10 (Oct. 25, 2017) (explaining that when a minor claimant cannot adequately describe his or her
 11 own symptoms, an ALJ properly considers a guardian's testimony in lieu of the claimant's
 12 testimony).

13 But as to Plaintiff's first argument, the Court agrees with Plaintiff that the ALJ erred in
 14 discounting allegations made by Plaintiff as well as Claimant because he relied on cherry-picked
 15 evidence to find their allegations inconsistent with the record.² The ALJ stated that Plaintiff and
 16 Claimant alleged that Claimant experienced learning problems as well as social problems, and
 17 the ALJ found these allegations inconsistent with the record, specifically the normal findings in
 18 Claimant's medical records as well as forms completed by two of Claimant's teachers in spring
 19 2020. AR at 19-23. The ALJ stated that the teachers' forms "give an impression that [Claimant]
 20 is doing well in school, which is consistent with the medical record." *Id.* at 20-23. Based on the
 21

22 ² The ALJ was required to provide clear and convincing reasons to discount Claimant's testimony and
 23 germane reasons to discount Plaintiff's testimony, but the ALJ's reasoning does not satisfy either
 standard. *See Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014) (setting forth standards of review
 applicable to a claimant's testimony); *Molina*, 674 F.3d at 1114 (setting forth standards of review
 applicable to lay testimony).

1 ALJ's reading of the record, the ALJ discounted allegations of disability because Claimant's
2 symptoms improved with conservative and routine treatment. *Id.* at 24-25.

3 But the ALJ's characterization of the record fails to account for the entirety of the
4 evidence, specifically the evidence that contradicts the ALJ's conclusion. Although the ALJ
5 referenced some of Claimant's abnormal symptoms, the ALJ nonetheless found that Claimant
6 had, for example, no limitation in her ability to interact and a less than marked ability to care for
7 herself (AR at 27-28), without explaining how those findings accounted for Claimant's suicide
8 attempt and suicidal ideation, hallucinations, anxiety attacks leading to absenteeism from school,
9 impulsive behaviors, or angry outbursts with other people multiple times per week, even while
10 medicated. *See, e.g., id.* at 54-55, 58, 446, 449, 452, 468, 472, 474, 538, 578-86, 644-46, 652,
11 663, 665-66, 710-11. The ALJ stated that the record "often showed fairly unremarkable findings"
12 (*id.* at 23) and only conservative and routine care (*id.* at 24), but the record documents significant
13 symptoms and treatment that are far from routine for a middle school student.

14 Evidence (*e.g.*, AR at 695-96) also suggested that Claimant required additional academic
15 and social-emotional support in school, contrary to the ALJ's assertion that Claimant "was doing
16 well in school." *See id.* at 27 (citing *id.* at 234-49). The ALJ furthermore failed to account for
17 Claimant's alternate school arrangement due in part to the COVID-19 pandemic and due in part
18 to her school accommodations, such that Claimant completed most of her schoolwork remotely
19 and received one-on-one instruction in person to assist in completing her assignments. *See, e.g.,*
20 *id.* at 43-44, 54-55, 61.

21 Because the ALJ relied on a selective reading of the record as well as Plaintiff's and
22 Claimant's testimony at the hearing, the ALJ's characterization of the record is not wholly
23 accurate. The ALJ erred in cherry-picking the normal findings from a record that also documents

1 significant abnormal findings, without adequately explaining why he found that the wealth of
2 abnormal findings did not corroborate Plaintiff's and Claimant's allegations. *See, e.g., Reddick v.*
3 *Chater*, 157 F.3d 715,722-23 (9th Cir. 1998) ("In essence, the ALJ developed his evidentiary
4 basis by not fully accounting for the context of materials or all parts of the testimony and reports.
5 His paraphrasing of record material is not entirely accurate regarding the content or tone of the
6 record. We conclude that his approach and conclusions do not fully account for the nature of
7 CFS and its symptoms."); *Gallant v. Heckler*, 753 F.2d 1450, 1455-56 (9th Cir. 1984) (holding
8 that an ALJ "cannot reach a conclusion first, and then attempt to justify it by ignoring competent
9 evidence in the record that suggests an opposite result"). The ALJ erred in discounting the
10 allegations of Plaintiff and Claimant as inconsistent with record without acknowledging that
11 significant evidence in the record in fact supports the testimony.

12 **B. The ALJ Erred in Assessing a Counselor's Opinion**

13 Claimant's treating counselor, Liana McMillan, MPH, completed a form opinion in June
14 2021 indicating that Claimant had many marked functional limitations. AR at 721-23. The ALJ
15 found Ms. McMillan's opinion unpersuasive because it was inconsistent with the teacher
16 questionnaires, as well as Claimant's normal physical and psychiatric findings in the record. *Id.*
17 at 25. The ALJ also found Ms. McMillan's opinion to be inconsistent with Claimant's "fairly
18 robust" activities of daily living. *Id.*

19 Under regulations applicable to this case, the ALJ is required to articulate the
20 persuasiveness of each medical opinion, specifically with respect to whether the opinions are
21 supported and consistent with the record. 20 C.F.R. § 416.920c(a)-(c). An ALJ's consistency and
22 supportability findings must be supported by substantial evidence. *See Woods v. Kijakazi*, 32
23 F.4th 785, 792 (9th Cir. 2022).

For the same reasons explained in the previous section, *supra*, the Court finds that the ALJ’s consistency finding with respect to Ms. McMillan’s opinion is erroneous because it ignores the evidence that contradicts the ALJ’s conclusion. The ALJ erred in contrasting Ms. McMillan’s opinion with only the cherry-picked normal findings, rather than considering whether the opinion was consistent with the record as a whole.

V. CONCLUSION

For the foregoing reasons, the Commissioner's final decision is REVERSED, and this case is REMANDED for further administrative proceedings under sentence four of 42 U.S.C. § 405(g). On remand, the ALJ should the ALJ shall reconsider Plaintiff's testimony, Claimant's testimony, and Ms. McMillan's opinion in light of the entire record.

Dated this 5th day of January, 2023.

M. J. Peterson

MICHELLE L. PETERSON
United States Magistrate Judge